FILED
United States Court of Appeals
Tenth Circuit

February 6, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: IBRAHEEM ALI, Movant.	No. 12-3017 (D.C. No. 5:08-CV-03225-SAC) (D. Kan.)

ORDER

Before **HARTZ**, **EBEL**, and **O'BRIEN**, Circuit Judges.

Ibraheem Ali, a Kansas state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. We deny authorization.

In 1998, Mr. Ali was convicted of kidnapping and two counts of aggravated robbery and sentenced to 194 months in prison. In 2003, he filed a § 2254 petition in district court, asserting that he was denied due process when the State withheld exculpatory evidence until the day after trial and he was denied effective assistance of counsel when counsel failed to compel the testimony of an alibi witness. The district court dismissed the petition as barred by Mr. Ali's procedural default in state courts. The court rejected Mr. Ali's claim that an alibi witness could establish his factual innocence. In doing so, the court noted that the state courts had rejected a post-conviction allegation that his trial counsel was

constitutionally ineffective for failing to call an alibi witness to support his defense.

In 2008, Mr. Ali, who was represented by counsel, filed another § 2254 petition, asserting that the State failed to disclose exculpatory evidence until after trial, the State violated a motion in limine by introducing evidence of prior robberies, his trial counsel was ineffective for failing to secure the attendance of alibi witnesses, his state post-conviction counsel was ineffective, his second state post-conviction proceeding was improperly dismissed, identification procedures were impermissibly suggestive, and cumulative error. The district court found nothing warranted equitable tolling and dismissed the petition as time barred. This court denied a certificate of appealability and dismissed the appeal. *Ali v. Roberts*, 340 F. App'x 459 (10th Cir. 2009).

On November 10 and 17, 2011, Mr. Ali filed two identical § 2254 petitions, asserting: ineffective assistance of § 2254 counsel; impermissible identification; ineffective assistance of trial counsel due to both counsel's belief he was guilty and counsel's failure to secure alibi witnesses to prove his actual innocence; the State turned over an exculpatory alibi witness statement after trial; the State violated an order in limine by eliciting testimony of his prior crimes; and actual innocence. The district court consolidated the petitions, determined they were unauthorized second or successive § 2254 petitions, and decided the court lacked jurisdiction to consider them. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir.

2008) (per curiam) ("A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until [the appellate] court has granted the required authorization."). In addition, the court rejected Mr. Ali's argument that *Holland v. Florida*, 130 S. Ct. 2549 (2010), provided support for equitable tolling of the limitations period for his prior § 2254 petition based on his § 2254 counsel's error and abandonment. Accordingly, the court declined to transfer the consolidated action to this court in the interests of justice, and, instead, dismissed for lack of jurisdiction.

Mr. Ali then filed with this court his motion for authorization to file a second or successive § 2254 petition. In order for him to receive authorization, he may not have raised the claims for which he seeks authorization in a prior § 2254. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). If he is not reasserting claims, we will grant authorization only if he makes a prima facie showing of either "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or new evidence that "could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but

for constitutional error, no reasonable factfinder would have found [Mr. Ali] guilty of the underlying offense[s]." 28 U.S.C. § 2244(b)(2)(A) & (B)(i) & (ii).

Mr. Ali seeks to assert the following claims in a second or successive § 2254 petition: (1) even though he exercised due diligence, his § 2254 counsel failed to file a timely first § 2254 petition; and (2) he is actually innocent, yet his trial counsel failed to put the State's case to adversary testing because counsel told an alibi witness he would be named as an accomplice if he testified. Mr. Ali contends that he has new law and new facts to support the first claim and new facts to support the second claim.

With respect to the first claim, Mr. Ali cites *Holland*, 130 S. Ct. at 2564-65, as his new law. *Holland*, however, does not indicate that it is a retroactively applicable new rule of constitutional law. In addition, a claim of ineffective assistance of § 2254 counsel cannot meet the prima facie showing of new evidence, because "[t]here is no . . . constitutional right to effective assistance of post-conviction counsel." *Anderson v. Sirmons*, 476 F.3d 1131, 1141 n.9 (10th Cir. 2007) (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)).

With respect to the second claim, Mr. Ali is again asserting actual innocence and ineffective assistance of counsel. Although he makes a slightly different argument now by suggesting one alibi witness was intimidated by his trial counsel, this is merely a new version of his prior argument that counsel

should have presented alibi witnesses to prove his actual innocence. *Cf. Bennett v. United States*, 119 F.3d 470, 472 (7th Cir. 1997) ("The theory is new, the claim is not. A rehashed claim is not a new claim."). Furthermore, the alleged new evidence Mr. Ali provides is not actually new evidence because it appears to have been available in 2006.

Accordingly, we DENY authorization. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk